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No. 88-449, 88-513

IN THE

# Supreme Court of the United States

**October Term, 1988**

JOHN F. HEALY, *et al.*,

*Appellants,*

*v.*

THE BEER INSTITUTE, *et al.*,

*Appellees.*

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.,

*Appellants,*

*v.*

THE BEER INSTITUTE, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## Motion for Leave to File Brief as *Amicus Curiae* and Brief of Wine and Spirits Wholesalers of America Inc. as *Amicus Curiae* in Support of Appellants

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**Motion of Wine and Spirits Wholesalers of America, Inc., For Leave to File Accompanying Brief as *Amicus Curiae*.**

Pursuant to the rules of the Court, the Wine and Spirits Wholesalers of America, Inc. ("WSWA") respectfully moves for leave to file the accompanying brief as *amicus curiae*. WSWA's arguments support appellants in this

consolidated appeal. Both appellants have consented to the filing of WSWA's brief.

**Interest of WSWA**

Founded in 1943, WSWA is the major national trade association for wholesale distributors of domestically produced and imported distilled spirits and wines, representing a constituency of more than 800 members in 44 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Numerous WSWA members also are wholesale distributors of domestic and imported beers and malt beverages. WSWA's mission is the advancement of the interests of independent wholesale distributors, consumers and the public-at-large pertaining to industry matters and, to that end, to encourage and support sound and equitable federal and state regulations for responsible marketing and consumption of all alcoholic beverages. WSWA is dedicated to the preservation of the principle of free enterprise, under sound regulations, uniformly applied, and of the *current* balance of state and national regulatory authority over commercial aspects of the alcoholic beverage industry embodied within the Twenty-First amendment to the United States Constitution.

Most WSWA member wholesalers do business pursuant to wholesale licenses issued by "open" or "license" states. ("Open" or "license" states permit alcoholic beverage importation and distribution by private enterprise as distinguished from those few "monopoly" or "closed" states in which the state itself operates the wholesaling business for one or more types of alcoholic beverages.) In recognition of the ever-increasing modern-day importance for government regulation of alcoholic beverages, which fuel significant state revenues and a panoply of state economic development interests, the open states subject each

separate level of trade (*i.e.*, producers, wholesalers and retailers) to stringent and highly detailed but purposefully integrated regulatory complexes. Reflecting the unique demographic, economic and political character and individual public priorities and policies of each state, these regulatory systems differ somewhat from state to state and from beverage to beverage.

The decision appealed from invalidates, as a direct regulation of interstate commerce in violation of the commerce clause, the beer price affirmation provisions of the Connecticut Liquor Control Act, Conn. Gen. Stat. Sections 30-63 a(b), b(b), c(b) and b(e). The provisions held unconstitutional require brewers and out-of-state importers "post" their prices to Connecticut wholesalers for the following month, require that the brewers and importers may not quote or charge a price higher than any wholesale price currently charged by that suppliers to wholesalers in any adjoining state, require that the supplier affirm with its filing that at a precise moment in time—the moment of posting—the price charged to Connecticut wholesalers is no higher than the lowest price then charged any adjoining states' wholesalers, and require brewers offer and supply Connecticut wholesalers all packages and sizes of their brands offered to their adjoining states wholesalers. Section 30-63b(e) of the Connecticut Liquor Law added in 1984 expressly states that the statute complex does not prohibit brewers from changing prices in any adjoining state or states "at any time during the calendar month covered by such posting." Connecticut has identical statutory provisions covering wines and distilled spirits.

Affirmation and wholesale price posting are integral parts of Connecticut's broader, comprehensive regulatory scheme governing virtually every aspect of the operations

of the alcoholic beverage industry in Connecticut. In the words of the Trial Court, these provisions serve "a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers". That is a particularly apt and appropriate subject of legislative concern for Connecticut, which is the only state with price affirmation covering beer. The Connecticut Legislature justifiably has sought to obviate predatory geographic price discrimination. See *e.g., Fall City Industries v. Vanco Beverage,* 460 U.S. 428 (1983); *Best Brands Beverage Inc. v. Falstaff Brewing Corp.,* 842 F. 2d 578 (2 Cir. 1987); *Best Brands Beverage Inc. v. Falstaff Brewing Corp.,* 653 F. Supp. 47 (SDNY 1985); *Anheuser-Busch Inc. v. FTC,* 289 F. 2d 835 (7 Cir. 1961).

Connecticut's affirmation approach to the subject is materially identical to that taken by Tennessee to assure its alcoholic beverage wholesalers received "most favored customer" prices from their suppliers. In sustaining the constitutionality of the Tennessee alcoholic beverage affirmation statute, the Sixth Circuit, in direct conflict with the Second Circuit's decision in the instant appeal, found any impact the statute may have on the interstate alcoholic beverage market, or interstate marketers' prices to wholesalers or those revenues and profits does not constitute a direct regulation of product prices in other states and is sanctioned by the Twenty-First Amendment. *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission,* Nos. 87-5870/87-5913, slip op. (6th Cir. Nov. 4, 1988). WSWA filed a brief *amicus curiae* supporting the constitutionality of the Tennessee law in that Sixth Circuit proceeding.[1]

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[1]WSWA also appeared *amicus curiae* before this Court in *Brown-Forman Distillers v. New York State Liquor Authority,* 476 U.S. 573 (1986).

As pointed out in the State of Connecticut's Jurisdictional Statement in No. 88-449, affirmation laws covering alcoholic beverages are currently enforced or are in litigation in seven license states or are purchase contract requirements in eighteen control states. At least eleven license states have price posting regulations requiring suppliers to file wholesale prices and to abide by them for stated time periods.

Thus, WSWA members in Connecticut, Tennessee and other affirmation and posting states have a vital interest in sustaining the constitutional validity of affirmation and favorably resolving the conflict in the lower circuits on the issue of whether similar alcoholic beverage affirmation statutes are constitutional under the Commerce Clause of the United States Constitution, U.S. Const. art. 1, Sec 8, cl. 3 or the Twenty-First Amendment, U.S. Const., Amend. XXI, Sec. 2 or Supreme Court precedent. That interest is wholly consistent with the public interest and state concerns apparent or express in the Connecticut affirmation and price posting provisions—and within the Tennessee scheme—namely, to curb or prohibit geographic price discrimination, its anticompetitive and incipient monopolistic tendency and its resultant economic domination by alcoholic beverage suppliers of their wholesale distributors and, in turn, retail outlets and the consuming public.[2]

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[2]Connecticut Liquor Law's regulation of the commercial aspects of alcoholic beverages goes beyond its most apparent interest in moderating the consumption and marketing of liquor, wine and beer and its concern for tax revenues. The wholesale trade's contribution to the state's economic health and development is recognized in the Connecticut Supreme Court's expression that the state's weighty core regulatory concern includes every aspect of the relationship between alcoholic beverage suppliers and their Connecticut wholesalers and the "social and economic problems created by sudden termination of the

(Footnote continued on following page)

WSWA members have a second and equally compelling interest in this appeal. It is the extent to which this Court's analytical approach and decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966) remains good law after the decision in *Brown-Forman Distillers v. New York State Liquor Auth.*, 106 S. Ct. 2080 (1986), Virtually every aspect of the operations of licensed wholesalers is subject to comprehensive regulation by the states in which they operate. Invalidation of affirmation or further severe questions as to the precedential authority and guidance to be found in the *Seagram* decision would in all likelihood have an effect on other related areas of state regulation of alcoholic beverages, threatening fundamental changes in the structure, competitive tenor and governmental regulation of the alcoholic bever-

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(Footnote continued.)

franchises." *Schieffelin v. Department of Liquor Control*, 194 Conn. 165, 181, 479 A.2d 1191 (Conn. 1984), wherein the Connecticut Supreme Court stated:

> "In addition (to the affirmation and posting provisions), there are provisions precluding rebates, free goods and tie-in sales. Gen. Stat. §30-94. These and other provisions of Connecticut statutes relating to credit, advertising, etc., make it apparent that Connecticut intends to and does control the supplying out-of-state shipper . . . to make certain that the owner of the brand name, out-of-state shipper, cannot dominate or control the Connecticut wholesalers. To promote this latter purpose, Connecticut has imposed statutory restrictions on the shipper's ability to terminate the authority of a wholesaler to distribute its products. Brennan, 'Liquor Control,' 54 Conn. B.J. 611, 613-14."

*See also All Brand Importers, Inc. v. Department of Liquor Control*, No. CV87-0332170S slip op. at 11-12 (Ct. Super. Ct., Hartford Dist., Dec. 6, 1988).

age industry in this country and consequent uncertainty, dislocation and economic harm.[3]

This WSWA concern goes beyond simple fear of an unsettling commercial precedent. It speaks to the policy and enforcement chaos potentially wrought on state legislators and administrators, who since 1935 repeal have confidently exercised plenary authority and discretion to regulate alcoholic beverage marketing by their jurisdiction's resident wholesalers and retailers. It speaks to the resulting enormous uncertainty among those who are regulated as to the validity of the well-tested, tightknit, and administratively successful programs governing the manner and methods they employ in virtually every step of their purchasing, marketing, physical distribution and financial operations. At risk in the potential answer to the fundamental question before this court as to the permissible scope of a state's right to regulate under the Twenty-First Amendment is the probable "deregulatory" erosion of the weight and paramountcy of states' alcohol control and economic regulatory authority. With quickly evolving national, continental and global markets for alcoholic beverages, a reduction of state regulatory authority or diminishment of the substantial and predominant character of state alcoholic beverage concerns and interests will have serious consequences for WSWA members.

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[3]See note 2, *supra*, for some types of these related areas in which Connecticut and other state alcoholic beverage regulations are dependent for their constitutional validity upon this Court's view as to the permissible scope of the Twenty-First Amendment and its interplay with the commerce clause principles. See *e.g. Schiefflin v. Department of Liquor Control, supra*, at 182-84 (upholding Connecticut's franchise termination regulations on Twenty-First Amendment grounds) and, to some effect, *Crowley Beverage Company v. Miller Brewing Company*, No. 88-5055, slip op. (8th Cir. December 6, 1988).

In this brief, WSWA believes that it presents matters germane to the Court's decision that may not be treated or may not be developed fully by the appellants because of their more focused perspectives.

For the foregoing reasons, *amicus* respectfully requests leave to file the accompanying brief.

Respectfully submitted,

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Dated: December 29, 1988

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## Interest of the Amicus.

The interest of WSWA in this matter has been set forth in the accompanying motion for leave to file brief as *amicus curiae.*

## Statement of the Case.

This appeal is addressed to the constitutionality of the affirmation provisions of Connecticut's comprehensive scheme regulating the manufactuing, distribution and sale of alcoholic beverages in the state. Conn. Gen Stat. Sections 30-63 a(b), b(b), c(b), and b(e).

The State of Connecticut attempted to remedy the constitutional infirmity of its affirmation laws in conformance with the Second Circuit's opinion in Healy I. *United States Brewers Ass'n, Inc. v. Healy,* 692 F.2d. 275 (2d Cir., 1982), *aff'd,* ____ U.S. ____, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983). Connecticut's amended affirmation law was challenged, upheld by the district court, but reversed by the Second Circuit in Healy II. *The Beer Institute v. Healy,* 849 F.2d. 753.

Meanwhile, the Sixth Circuit has upheld Tennessee's affirmation law in a reversal of an opinion of a district court.

## SUMMARY OF ARGUMENT.

This appeal presents straightforward questions of constitutional law: (1) Whether the "beer price affirmation and posting" provisions of the Connecticut Liquor Control Act, Conn. Gen. Stat. § 30-6 *et seq.* separately, or in conjunction with each other, have the effect of determining brewers' specific prices in states adjoining Connecticut, thereby directly regulating those prices and imposing an impermissible burden on interstate commerce, and, (2) if so, whether the Twenty-First Amendment shields that state's legislative initiative to prohibit, or at the least, inhibit, predatory and geographic price discrimination among brewers serving regional and national markets. *Amicus* respectfully submits that the answer to the first question is clearly "no," in that the asserted extraterritorial effects of the beer price affirmation provisions on the actual prices and discounting practices of the appellee brewers have not been substantiated and remain matters of pure "conjecture." Even if the question is answered otherwise, the answer to the second is a clear, resounding "yes."

In the twenty-two years since the Court rejected an abstract facial challenge to the first alcoholic beverage price affirmation law in *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966), similarly-targeted anti-discrimination laws have been enacted by numerous states. Today, materially identical affirmation provisions requiring that suppliers' wholesale transactions into a state are priced effectively on a "most favored customer" basis are enforced in seven license states. They are ostensibly supported by a recognition that Section 2 of the Twenty-First Amendment is "unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to

one product—intoxicating liquors", *Castlewood International Corp. v. Simon,* 596 F.2d 638, 642 (5 Cir. 1979), *vacated and remanded* 446 U.S. 949, 100 S.Ct. 2914, *panel opinion reinstated* 626 F.2d 1200 (5 Cir. 1980); that, as stated by Justice Rehnquist, Section 2 of the Twenty-First Amendment confers "something more than normal state authority over public health, welfare and morals", *California v. LaRue,* 409 U.S. 109, 114, 93 S.Ct. 390, 395, 34 L.Ed.2d 342, 349-50 (1972); that because of the Twenty-First Amendment a state statute regulating the sale of alcoholic beverages is entitled to an "added presumption in favor of (its) validity", *New York State Liquor Authority v. Bellanca,* 452 U.S. 714, 718, 101 S.Ct. 2599, 2602, 69 L.Ed. 2d 357 (1981) (*per curiam*) (quoting *California v. LaRue,* 409 U.S. at 118, 93 S. Ct. at 397, 34 L. Ed. 2d at 352); and *Seagram's* guideline that insuring a state's alcoholic beverage trade and consumers nondiscriminatory prices is a legitimate and weighty state concern.

Surely the efficacy of a state's administration and enforcement of such legislation also rests squarely upon *Seagram's* further assurance that a state's affirmation regulations can be subject to constitutional condemnation on Commerce Clause grounds only upon a competent demonstration of concrete marketplace experience making it "clear" the law "must inevitably produce" prices in other states other than those which would exist absent the challenged regulations. *Seagram, supra* at 43. Undoubtedly, any lesser evidentiary standard would require a reviewing court erroneously to indulge in "matters of conjecture", upon which constitutional invalidity cannot and must not be premised. But that is precisely what the Court of Appeals did below. It found Connecticut's affirmation provisions operate "to control prices beyond Connecticut's borders" and have restricted "a brewer's ability to offer

volume discounts in the border states". This conclusion was based on a record absolutely devoid of competent current evidence pertaining to the affirmation provision's actual impact on the interstate beer markets or market in which appellee brewers operate, the actual prices charged in any interstate market, or, for that matter, in Connecticut, New York, Massachusetts and Rhode Island. Neither does the record sustain any conclusion respecting whether such brewers *in fact* ever offer to sell or sell beer at volume discounted prices to their franchised wholesalers or others in those states or anywhere in the United States.

In the case at bar, there is no record of the brewers' concrete marketplace experience and, as in *Brown-Forman Corporation v. Tennessee Alcoholic Beverage Commission, supra,* it is impossible for this or any tribunal clearly to determine to what extent any of the brewers may have actually raised prices or have refrained from lowering prices or offering volume discounts in any relevant marketplace.

However, even if the record sustains some extraterritorial influence or impact (such as a timing delay in brewers' implementation of a pricing decision for a state) for which the causal nexus is the challenged Connecticut affirmation provisions, *Amicus* submits that influence, impact or delay is indirect and incidental to legitimate state alcoholic beverage control legislation upon any interstate marketer of alcoholic beverages, and the Connecticut Liquor Law provisions in issue are shielded from constitutional condemnation on Commerce Clause grounds by operation of the Twenty- First Amendment as an apt, justified and appropriate state initiative to curb predatory intrastate and geographic (interstate) price discrimination among brewers and importers serving regional and national markets.

## Argument.

The fundamental issue raised here is whether the Supreme Court's decision in *Joseph E. Seagram & Sons, Inc. v. Hostetter,*[1] approving the objectives of affirmation, remains good law after the decision in *Brown-Forman Distillers v. New York State Liquor Auth.*[2] Difficult and unsettled issues relating to this country's history and national economic policies are implicated by this question. These historic and economic concerns must be evaluated and resolved in the context of two competing and ill-defined constitutional provisions: the dormant (or implicit limitations of the) commerce clause and section two of the twenty-first amendment.

Given the increasingly national, if not international, character of business today, to some national and multinational business barons state boundaries in many respects may seem at best irrelevant and at worst impediments to commerce generating the greatest revenues and highest profit potential. This purely entrepreneurial view of economic integration suggests that the proliferation of fifty separate sovereign systems to regulate an article in commerce such as alcoholic beverages is somewhat "Goldbergian." From this perspective some also may be tempted to question why, in 1988, alcoholic beverages continue to be treated as a unique article in commerce.

History explains, if it does not justify, the present state of affairs. Alcoholic beverages have been treated as a unique item in commerce to be regulated by local and state governments since this country began. In fact, in many states, the availability of alcoholic beverages for resale is a hotly-debated moral and religious issue. Today,

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[1]384 U.S. 35, 85S.Ct. 1254, 16 L.Ed.2d 336 (1966).
[2]106S.Ct. 2080 (1986).

dire and also hotly-debated health care, social, cultural and political concerns about moderation in the consumption, advertising and marketing of alcoholic beverages vary in intensity, focus and approach from city to city, state to state and region to region in this country. As yet, there is no concensus about these concerns, except, perhaps, that alcoholic beverages remain a unique item in commerce and special rules for the industry marketing them must continue to be predicated on recognition of the localized historical, social, cultural and political diversity in the sovereign fifty states tolerated and guaranteed in this nation's federal system.

Recognizing the need for local control and regulation, the Supreme Court held, long before enactment of the Eighteenth Amendment, that states could regulate alcoholic beverages free of restraints imposed by the commerce clause.[3] Soon after the repeal of that amendment a number of states banded together and entered into the Des Moines warranty. Those states, known as monopoly states, distributed alcoholic beverages as wholesalers and often, as retailers. As part of their contract with suppliers, these states required that the suppliers warrant that the price offered was the lowest price anywhere in the country. This practice was adopted by the monopoly states to control price and eliminate price discriminations resulting from rebates, discounts and other price reductions given in the license state.[4] The remaining states, which could not muster the political support necessary to establish a monopoly, enacted regulatory systems that in-

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[3]*License Cases*, 5 U.S. (How) 504, 579, 12 L.Ed. 256 (1847); *Craig v. Boren*, 429 U.S. 190, 205-06, 97 S.Ct. 451, 50 L.Ed.2d 397 (1956).

[4]*See* de Gandahl, Trade Practice & Beverage Control in the Alcoholic Beverage Industry, LAW & CONTEMP. PROBLEMS 664, 667.

cluded price control and price discrimination provisions of some sort.[5].

While the monopoly states, which regulate every aspect of the distribution of alcoholic beverages, including contractual warranties with suppliers that are much more exacting than Connecticut's affirmation statute, are immune from commerce clause restraints as market participants,[6] the majority of license states do not enjoy such immunity. The issue presented here is then whether *Seagram* survives *Brown-Forman,* and, if this Court does in fact retreat from its opinion in *Seagram,* the direct impact of this Court's ruling upon the number of states that utilize affirmation to assure lower prices and prevent price discrimination.

Two courses present themselves in answering the fundamental question posed: the apparent distinctions between *Brown-Forman* and *Seagram* simply can be recited, or the answer may be pursued through the labayrinth of commerce clause and Twenty-First Amendment cases. While the latter course is not without difficulty, it nevertheless provides the more sound basis for resolving this case.

In a seminal article on the dormant commerce clause, recently relied upon by this court in upholding a state tender offer statute,[7] a method for analyzing state protec-

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[5]*Id.* at 680.

[6]*See White v. Massachusetts Council of Constructions Employers,* 406 U.S. 204, 206-07, 214-15, 103 S.Ct. 1043, 75 L.Ed.2d ____ (1983); *Reeves, Inc. v. Stake,* 447 U.S. 429, 438, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980); *Hughs v. Alexandra Scrap Corp.,* 426 U.S. 794, 806, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1970).

[7]*CTS Corp. v. Dynamics Corp. of America,* ____U.S. ____, 107 S.Ct. 1637, ____ L.Ed.2d ____ (1987).

tionism was both described and prescribed.[8] In that article, it was suggested that the focus of the clause—state protectionism—is the sole relevant inquiry; the clause is not a vehicle for evaluating the wisdom *vel non* of state legislation simply because it impacts on interstate commerce. In relying on the reasoning in this article, this court appears to have adopted the test prescribed.

Affirmation laws do not violate the commerce clause because they do not impermissibly discriminate against interstate commerce. Put another way, while the unique treatment of alcohol historically and constitutionally may have created a commercial system that is out of step with present views of interstate commerce held by some national and multi-national entrepreneurs, the impact of that system's affirmation laws on commerce is not an actionable one under the dormant commerce clause.

The commerce clause, which constitutes an express grant of power to Congress to regulate trade among the states, contains an implicit limitation on state actions affecting interstate commerce. *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1851); *The Passenger Cases,* 48 U.S. (7 How.) 282, 12 L.Ed. 72 (1949). This implicit limitation is aimed at local laws that are protectionist, favoring local interests at the expense of those in other states. *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 26, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984); *City of Philadelphia v. New Jersey,* 337 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Protectionism is prescribed because it is anathema to the concept of political union, it promotes retaliation, and it results in economic inefficiency. *See* Regan, *The Supreme Court and State Protec-*

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[8]Regan, *The Supreme Court and State Protectionism Making Sense of the Dormant Commerce Clause,* 84 MICH.L.REV. 1091 (1986).

*tionism: Making Sense of the Dormant Commerce Clause,* 84 MICH.L.REV. 1091, 1113-15 (1986) (hereafter *"Regan"*).

The provincialism proscribed by the commerce clause can take three forms: (1) legislation expressly referring to state lines; (2) legislation motivated by a protectionist purpose; and (3) legislation producing a protectionist effect. *Regan, supra,* at 1126 *et seq.* Apart from prohibiting outright legislation that on its face discriminates between in-state and out-of-state suppliers, the Court has recently announced that the commerce clause also prohibits states from extending their legislation beyond their borders so as to regulate extraterritorial transactions. *See Edgar v. MITE Corp.*, 457 U.S. 624, 642, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982). A state law that does not discriminate on its face or regulate extraterritorially may still have a discriminatory effect on interstate commerce. In such cases, this court has often stated that it must balance the nature of the local interest served and the degree to which it is served by the challenged regulation against the effects of that regulation on interstate commerce. *Arkansas Electric Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, ____ S.Ct. ____, ____ L.Ed.2d ____ (1983); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).[9]

WSWA submits, however, that this court historically has, in fact, *not* engaged in balancing local interests against generalized claims of interstate injury. Further,

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[9]The process of balancing the respective interests has been seriously criticized as being at variance both with the scope of the protections of the dormant commerce clause and of the role of the federal judiciary in assessing state legislation. *See CTS Corp. v. Dynamics Corp. of America, supra,* 107 S.Ct. at 1652-53 (Scalia, J.) (concurring).

this court has recently adopted a narrower test under the dormant commerce clause. *See CTS Corp. v. Dynamics Corp. of America, supra,* 107 S.Ct. at 1652-53.

Since the affirmation statute here does not discriminate between in-state and out-of-state suppliers on its face or subject them to differing obligations, WSWA submits that under the more narrow test of *CTS,* the commerce clause inquiry is at an end. Alternatively, assuming that a *Pike* balancing is appropriate here, the Connecticut affirmation statute is clearly constitutional for the following reasons:

> I. Under the Twenty-First Amendment, Connecticut has greater authority to regulate alcoholic beverages free of constitutional restrictions than when regulating other types of commercial activity. *California v. La Rue,* 400 U.S. 109, 114, 93 S.Ct. 390, 34 L.Ed.2d 390 (1972); *United States v. Frankfort Distillers,* 324 U.S. 293, 299, 65 S.Ct. 661, 89 L.Ed. 951 (1945). See *California Retail Liquor Dealers v. MidCal,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980).
>
> II. This Court has expressly approved liquor regulation aimed at keeping prices low and curbing geographic price discrimination and doing so through legislation geared to pricing policies in other states. *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 43, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966); *Brown-Forman Distillers v. New York State Liquor Authority, supra,* 106 S.Ct. at 2085. Preventing geographic price discrimination by regional and national brewers remains an apt and appropriate goal for Connecticut. See cases cited at *Amicus* Motion for Leave to file Brief at p. 4.

III. The objective of the Connecticut affirmation statute to maintain lower prices through the elimination of price discrimination closely parallels federal policy embodied in the Robinson-Patman Act, 15 U.S.C. ¶ 13(a).

IV. The mere existence of extraterritorial effects does not, by itself, establish a claim of discrimination against interstate commerce when the burden falls equally on in-state and out-of-state suppliers. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 126, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); *Minnesota v. Clover Leaf Creamery Co.,* 448 U.S. 456, 471-72, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). See also *Northeast Bancorp, Inc. v. Board of Governors,* 105 S.Ct. 2545 (1985)(dicta supporting the principle certain extraterritorial effects and discriminations will be constitutionally tolerated in the face of particularized local concerns and needs).

V. There is no evidence that Connecticut's affirmation law *per se* has any extraterritorial economic impact nor has influenced *in any way* the extent to which brewers have actually raised prices or have refrained from lowering prices or offering volume discounts in New York, Massachusetts or anywhere else for that matter.[10]

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[10]It is important to note the facts relating to the structure and pricing practices of the beer industry relied upon by both the district court and the Court of Appeals were the parties' submissions in *United States Brewers Ass'n v. Healy,* 692 F.2d 275 (2 Cir. 1982) and are dated. The difficulties in assessing the factors today influencing prices in New York, for example, see Note, Vertical Restraints in the *Brewing Industry,* 50 Brooklyn L.R. 143, 148-153 (1983).

> VI. The evil to which the *Brown-Forman* decision was addressed was the extraterritorial effect of New York's statute in locking in pricing practices in other states and creating conflicting obligations on suppliers, and not a concern for unproven or hypothesized extraterritorial economic effects. *Brown-Forman Distillers v. New York State Liquor Authority, supra,* 106 S.Ct. at 2086, 2087, 2088 *cited with approval in CTS Corp. v. Dynamics Corp. of America, supra,* 107 S.Ct. at 1649.

In summary, Connecticut's affirmation statute is an unobtrusive, nondiscriminatory statute, aimed at a permissible and federally-sanctioned purpose. It does not burden interstate commerce but specifically frees the hands of suppliers to charge different prices in border states during the posting period.

Moreover, as alcoholic beverages remain an item to be uniquely treated even in the face of today's drive toward economic integration within this nation, within the continent and globally, so *Seagram's* guideline remains good, wise and constitutionally sound law, for it best and correctly embodies the premises of the Twenty-First Amendment recognized by Mr. Justice Frankfurter in his comment on the effect of the Twenty-First Amendment on guarantees otherwise provided by the Constitution in *United States v. Frankfort Distilleries, Inc.,* 324 U.S. 293, 300 (1945):

> The Twenty-First Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment—disregarding the interlude of the Eighteenth

> Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-First Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control effectively the traffic in liquor within its borders . . .

**Conclusion.**

For the above reasons, the decision of the Second Circuit should be reversed, and the cause remanded to the district court for action not inconsistent with this Court's opinion.

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Respectfully submitted,

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